

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18113997
ALIGN HOSPITALITY FURNISHINGS, LLC) Date Issued: October 3, 2019
)
)
)
)

OPINION

Representing the Parties:

For Appellant: Linda T. Sung, Esq., CPA

For Respondent: Joel M. Smith, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Align Hospitality Furnishings, LLC (appellant) appeals an action by respondent Franchise Tax Board (FTB) in denying appellant’s claim for refund of \$1,948.30 for the 2017 tax year.¹

Appellant waived its right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has demonstrated reasonable cause for the late payment penalty imposed under R&TC section 19132.
2. Whether the underpayment of estimated LLC fee penalty imposed under R&TC section 17942(d)(1) should be abated.

FACTUAL FINDINGS

1. Appellant is an LLC that is treated as a partnership for most, but not all, California tax purposes.
2. For the 2016 tax year, appellant’s LLC fee due was \$11,790.

¹ This amount includes an underpayment of estimated limited liability company (LLC) fee penalty of \$1,179 and a late payment penalty of \$769.30.

3. For the 2017 tax year, appellant mistakenly filed a timely partnership return (Form 565) instead of an LLC return (Form 568).
4. Appellant subsequently became aware of its error and timely filed, on March 14, 2018, a 2017 LLC tax return (Form 568), reporting an LLC annual tax of \$800 and an LLC fee of \$11,790. Appellant's return reported a balance due of \$11,790, which was paid in full by or before July 9, 2018.² Appellant did not timely pay any portion of an estimated LLC fee by the June 15, 2017 due date.
5. FTB issued a Return Information Notice on June 26, 2018, imposing a late payment penalty of \$769.30 and an underpayment of estimated LLC fee penalty of \$1,179.
6. Appellant paid the balance due and filed a claim for refund of the penalties. FTB denied the claim and this appeal followed.

DISCUSSION

Issue 1: Whether appellant has demonstrated reasonable cause for the late payment of the LLC fee.

R&TC section 19132(a)(1)(A) imposes a late payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. Generally, the date prescribed for the payment of the tax is the due date of the return (determined without regard to extensions of time for filing). (R&TC, § 19001.) The late payment penalty, however, does not apply when the failure to pay is due to reasonable cause. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.) To establish reasonable cause for the late payment of tax, a taxpayer must show that its failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) Reasonable cause exists when the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Id.*)

Appellant was required to pay its LLC fee on or before the due date of the return, the 15th day of the fourth month of the year following its taxable year. (R&TC, § 18633.5.) Appellant did not pay the LLC fee by the April 15, 2018 due date. Therefore, the late payment penalty was properly imposed.

² FTB gave appellant credit for two \$800 payments made on or about February 2, 2017, and March 20, 2018. It appears that the February 2, 2017 payment was credited against the annual LLC tax due from appellant for 2017, and the March 20, 2018 payment was credited to the LLC fee due from appellant for 2017.

Appellant contends that it improperly relied on its tax preparer, who mistakenly believed a partnership return should be filed, instead of an LLC return, and timely filed that return. Appellant contends that, as a result, neither appellant nor its return preparer was prompted to make payment of the LLC annual tax and fee.

In *United States v. Boyle* (1985) 469 U.S. 241, 252, the U.S. Supreme Court held that “[t]he failure to make a timely filing of a tax return is not excused by the taxpayer’s reliance on an agent, and such reliance is not ‘reasonable cause’ for a late filing” Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle, supra.*) The court, however, did observe that reasonable cause may exist if a taxpayer relies on the advice of an accountant or attorney as to a substantive matter of tax law or as to whether a return needs to be filed in the first place, even when such advice turned out to have been mistaken. (*Id.* at pp. 250-251.) If a taxpayer relies on improper advice of an accountant or tax attorney as to a substantive matter of tax law, failing to file a return in reliance on that advice may be considered reasonable cause if two conditions are met: (1) the person relied on is a tax professional with competency in the subject tax law; and (2) the tax professional’s advice is based on the taxpayer’s full disclosure of the relevant facts and documents. (*Estate of La Meres v. Commissioner* (1992) 98 T.C. 294, 315-318.)

Appellant does not provide any evidence to clarify the circumstances that led to the original incorrect filing of the return, such as communication with the CPA that led to the CPA’s failure to timely file the proper return with FTB. Appellant acknowledges that there was a miscommunication, but does not describe the nature of that miscommunication. However, appellant admits that there was not a full disclosure of the relevant facts concerning appellant’s situation and entity type to its CPA. Accordingly, appellant has not sustained its burden of proving that it relied on improper advice as to a substantive matter of tax law after a full disclosure of the relevant facts relating to appellant’s tax situation, which may constitute reasonable cause for the late payment. Accordingly, we find appellant has not established reasonable cause for failing to timely pay the LLC fee.

Issue 2: Whether the underpayment of estimated LLC fee penalty should be abated.

R&TC section 17942 imposes an LLC fee based on total California source income of LLCs that are doing business in California. The LLC fee is required to be estimated and paid on or before the 15th day of the sixth month of the taxable year. (R&TC, § 17942(d)(1).) When the

estimated payment of the LLC fee is less than the amount of LLC fee due for the taxable year, a penalty equal to 10 percent of the underpayment is imposed unless the fee amount that was timely estimated and paid was equal to or greater than the total amount of the LLC fee for the preceding taxable year. (R&TC, § 17942(d)(2).) The statute does not provide for a reasonable cause defense to imposition of the penalty.


Here, FTB assessed an underpayment of estimated LLC fee penalty because the LLC fee was required to be estimated and paid by June 15, 2017. Appellant raises a reasonable cause defense to the imposition of the penalty by contending that it improperly relied on its tax preparer. However, the only defense to the penalty authorized by statute is the safe harbor provision which provides that the penalty will not be imposed if the estimated LLC fee payment is equal to or exceeds the LLC fee due for the prior tax year. Here, appellant did not make any timely payments of the LLC fee, so appellant’s timely payments for 2017 of zero do not exceed the 2016 LLC fee of \$11,790. Therefore, the safe harbor is inapplicable and there is no basis for abating the penalty.

HOLDINGS


1. Appellant has not demonstrated reasonable cause for the late payment of the LLC fee.
2. The underpayment of estimated LLC fee penalty should not be abated.

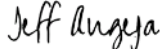
DISPOSITION

FTB’s action is sustained.

DocuSigned by:

 B90E40A720E3440...
 Josh Lambert
 Administrative Law Judge

We concur:

DocuSigned by:

 0C905428E88D4E7...
 Tommy Leung
 Administrative Law Judge

DocuSigned by:

 0D390BC3CCB14A9...
 Jeffrey A. Angeja
 Administrative Law Judge